No. 99-1978

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. *Recusal/Quorum*. Respondents acknowledge (Br. in Opp. 14) that the Rule of Necessity permits a Justice to participate in a case, even if that Justice might be disqualified under 28 U.S.C. 455, when recusal would deny "litigants a fair forum in which they can pursue their claims." *United States* v. *Will*, 449 U.S. 200, 217 (1980). That is precisely the situation in this case. Only this Court can entertain the government's argument that this Court's decision in *Evans* v. *Gore*, 253 U.S. 245 (1920), no longer represents the proper interpretation of the Compensation Clause, Art. III, § 1, and should therefore be definitively overruled.

The court of appeals ruled that it was bound to follow *Evans* (see Pet. App. 59a-61a), and on that basis it held two Acts of Congress unconstitutional. But if a quorum of this Court is not available to review that decision, then the

United States will be deprived of the opportunity to argue to the only competent forum that *Evans* is no longer good law. Thus, even if Section 455 might indicate recusal by one or more Justices, the Rule of Necessity permits all the Justices to hear and decide this case. See *State ex rel. Mitchell* v. *Sage Stores Co.*, 143 P.2d 652, 656 (Kan. 1943) ("[I]t is well established that actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated.") (quoted with approval in *Will*, 449 U.S. at 214), aff'd on other grounds, 323 U.S. 32 (1944).[1]

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[1] Respondents mistakenly state (Br. in Opp. 14) that *Will* held that the Rule of Necessity applies *only* when all Article III judges have an interest in the outcome of the case. In fact, while *Will* held that the Rule of Necessity does apply in that situation, it did not hold that the Rule applies *only* in such a case. Indeed, *Will*'s approving quotation of *Sage Stores*, discussed in the text, suggests otherwise, because the Kansas Supreme Court stated there that the Rule applies when disqualification would prevent the "court of last resort" from hearing a case. Similarly, in *Evans* v. *Gore*, this Court stated that it would hear the case because, once the district court rejected the plaintiff judge's Compensation Clause claim, "there was no other *appellate tribunal* to which under the law he could go." 253 U.S. at 248 (emphasis added). In *Will*, the Court indicated that *Evans* had applied the Rule of Necessity. See 449 U.S. at 215 & n.18.

That point about *Evans* is particular noteworthy because, under respondents' understanding of *Evans*, the district judge who heard that case was not disqualified to do so. Respondents maintain (Br. in Opp. 17-18) that the issue in *Evans* was the constitutionality of applying the income tax to the salaries of already-sitting federal judges. The case involved a federal statute imposing taxes on income, including federal judges' salaries, enacted on February 24, 1919. See 253 U.S. at 246. District Judge Peck, however, was appointed later in 1919, after the income tax on judicial salaries had already taken effect. See 58 Cong. Rec. 7969 (1919); *Biographical Dictionary of the Federal Judiciary* 217 (Harold Chase et al., comp. 1976); *Evans* v. *Gore*, 262 F. 550, 550 (W.D. Ky. 1919), rev'd, 253 U.S. 245 (1920). Even respondents would agree, therefore, that

Moreover, respondents notably do not argue that a quorum of the Court is lacking on the ground that at least four Justices *currently* have a financial interest in this case. Section 455(b)(4), however, speaks unmistakably in the present tense, requiring disqualification if a Justice "*has* a financial interest in the subject matter in controversy or in a party to the proceeding." (Emphasis added.) Thus, a Justice is disqualified at this point only if he or she *has* a financial interest in *this* proceeding—*i.e.*, *this* certiorari petition, not a past one.

Respondents rely instead (Br. in Opp. 13) on a rule of practice developed in the lower courts, that once a district judge recuses himself from a case, that judge may issue no further substantive rulings in the case. The cases cited by respondents, however, do not involve a situation like this one, where a case returns to a court after further proceedings in a lower court, and where changed circumstances have terminated the basis for disqualifications that led to recusals on the prior petition. In addition, the rule of practice respondents invoke reflects the understanding that once a district judge removes himself from a case, the case is simply no longer before that judge; it also reflects the fact that many other district judges will usually be available to hear the case. Neither rationale is applicable to recusal in this Court, a multi-member appellate court with the responsibility for making final determinations about the constitutionality of federal statutes.

Judge Peck's compensation could not have been "diminished" by the application of the income tax act to judicial salaries, see Br. in Opp. 18 n.10, and so Judge Peck could not have had an interest in the case. Thus, if respondents' understanding of the Rule of Necessity (that it applies only when *every* judge has an interest in the case) were correct, this Court should not have decided *Evans* on the merits—especially since every Justice of this Court then sitting had been appointed before the 1919 income tax statute under review took effect. See 253 U.S. at iv (allotment of Justices to Circuits from 1916).

2. *Law of the Case.* Respondents acknowledge (Br. in Opp. 15) that this Court is not barred from considering the merits of the Compensation Clause issue in this case by its prior order entered under 28 U.S.C. 2109, affirming the judgment of the court of appeals for lack of a quorum. Respondents note that in *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1868), the Court stated that a final judgment affirmed by this Court in a tie vote is "conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case." In *Durant*, however, the Court was considering the res judicata effect of a final circuit court decree dismissing a bill in equity, which an equally divided Court had affirmed. *Id.* at 109. The Court held that the decree was to be treated as final, just as would have been the case if it had been affirmed in a reasoned opinion or if the appeal had been dismissed. *Id.* at 112. That statement in *Durant* is inapposite here because the Court was not there considering the effect of an affirmance of an interlocutory order—which of course is not entitled to res judicata effect—nor was it considering the effect of an order affirming a lower-court judgment for lack of a quorum—which, unlike a tie-vote affirmance, is entered by operation of law and does not reflect consideration of the merits of the case by the Court. The Court's order of affirmance entered on our prior certiorari petition did not reflect any judgment by this Court about the merits of the controversy and so does not prevent the government from raising the Compensation Clause issue again in this Court.[2]

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[2] Respondents also state, without citation (Br. in Opp. 16-17), that after this Court's affirmance of the Federal Circuit's earlier decision, the Administrative Office of the United States Courts (AOUSC) offered the affected judges the option to discontinue the challenged tax deductions into the future. The Department of Justice, however, did not advise AOUSC that it could do so, and the fact that AOUSC may have decided to

3. *Merits.*

a. Respondents press their argument (Br. in Opp. 17-20) that the Constitution's reference to judges' "Compensation" in Article III must mean their salary net of taxes, and so any new taxation of sitting judges' salaries is unconstitutional. But as we noted in our petition (Pet. 28 n.26), if respondents' understanding of "Compensation" is correct, then it is difficult to see why the Clause would not also prohibit Congress from increasing the rate of income tax on sitting judges, or imposing a special surtax. Respondents assert (Br. in Opp. 29) that there simply is a difference between a new tax and an increased tax, but they do not explain why, or how one might distinguish in principle between the two. Indeed, Social Security taxes are merely a kind of income tax. See 26 U.S.C. 3101(a) and (b) (imposing Social Security taxes "on the income of every individual").[3]

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do so without waiting for the courts to enter final judgment in this case is hardly a reason to prevent the United States from pressing its arguments to this Court. Nor has Congress authorized AOUSC to cease the Social Security tax deductions from respondents' salaries. We also note that even respondents have never argued that Congress was prohibited by the Compensation Clause from subjecting their salaries to Social Security taxes; respondents have argued, rather, that when Congress imposed such taxes on them, Congress was also required to compensate them for the incidence of the tax on their salaries. (That point explains why the Federal Circuit ruled at an earlier stage of this litigation that respondents were not required to abide by the procedural requirements of a tax-refund suit. See Pet. App. 26a.) It is not clear, therefore, by what warrant AOUSC may have ceased the deductions.

[3] Respondents observe (Br. in Opp. 29) that no judge has yet brought suit challenging the application of a tax increase to judicial salaries. While it is impossible to state with certainty why such a suit has not yet been brought, we suggest that, before this Court decided *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), the Court's decision in *Evans* was generally read to hold that Congress could not impose income taxes on judicial salaries at all (see *Miles* v. *Graham*, 268 U.S. 501 (1925)), whereas after *O'Malley*, it was generally understood that *Evans* had been interred and that the imposition of generally applicable income taxes on judicial

Respondents' understanding of "Compensation," moreover, creates further serious textual problems. The Constitution provides that the President "shall receive for his Services, a Compensation, which shall neither be *increased nor diminished* during the Period for which he shall have been elected." U.S. Const. Art. II, § 1, Cl. 7 (emphasis added). Under respondents' understanding of "Compensation," Congress could not eliminate or reduce any tax on the President's salary while he was in office, even if that elimination or reduction were generally applicable to all citizens, because such an action would "increase[]" the President's compensation net of taxes. The Twenty-seventh Amendment also provides that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." U.S. Const. Amend. XXVII.[4] Thus, in respondents' view, Congress could not immediately impose new taxes or increase taxes on its own Members' salaries, even if it did so with respect to the general population, because such an action would "vary[] the compensation" of Senators and Representatives. Respondents' textual analysis therefore leads to the conclusion that, when Congress adjusts income taxes, it is required either to discriminate *against* the President (if reducing rates) or *in favor of* itself (if raising rates). This implausible result demonstrates that

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salaries did not implicate the Compensation Clause at all. See *Will*, 449 U.S. at 227 n.31 (stating that "*O'Malley* must also be read to undermine the reasoning of *Evans*"). Now that the Federal Circuit has found new life in *Evans*, there may no longer be a consensus about the reach of that decision.

[4] The Twenty-seventh Amendment was proposed to the States by the First Congress and was first introduced in the House of Representatives by James Madison, who obviously was familiar with the Framers' understanding of the term "Compensation" as used in the Constitution. See 1 *Debates and Proceedings in the Congress of the United States* 452, 457, 756-757, 948, 950 (Joseph Gales comp. 1789).

respondents' reading of the Compensation Clause cannot be sustained.

b. Respondents also defend the decision in *Evans* by arguing (Br. in Opp. 20) that, when they were considering whether to accept a judicial commission, they compared their private-sector salaries, which were then subject to Social Security taxes, with the prospect of judicial salaries indefinitely free of such taxes. Thus, respondents argue, the subsequent extension of Social Security taxes to their judicial salaries made the judicial position relatively less attractive. That rationale, however, could not have been the basis for the Court's decision in *Evans*. The plaintiff in *Evans* became a district judge in 1899, when there was no federal income tax at all.[5] Thus, when Judge Evans took office, he could not have been comparing the relative merits of a private salary subject to federal income tax with a judicial salary free of such a tax. Moreover, respondents' argument suggests that, even if Congress could apply new taxes at one time to both private and judicial salaries, it could not first apply the tax to private salaries and later extend it to judges. The text of the Compensation Clause gives no hint that Congress is constitutionally compelled to retain permanently any exceptional relief from income taxation that it may once have granted to judges.

c. Respondents also argue (Br. in Opp. 22-24) that Congress unconstitutionally discriminated against federal judges when it extended Social Security taxes to their salaries. The court of appeals did not address that contention, and the Court of Federal Claims correctly rejected it. See Pet. App. 48a-50a.

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[5] Judge Evans took office after this Court's decision in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), holding the income tax unconstitutional, but before the Sixteenth Amendment was adopted in 1913. See 253 U.S. at 246.

When Congress extended Social Security taxes to judicial salaries, it merely brought taxation of those salaries in line with the treatment of the vast majority of other wage-earners in this country.[6] Respondents object (Br. in Opp. 23), however, that Congress did not also require all federal employees who were then in service to pay the old-age, survivors, and disability insurance (OASDI) portion of Social Security taxes.[7] Congress was aware, however, that most federal employees were already required to make salary contributions to a separate retirement system, the Civil Service Retirement System (CSRS), which had been in place since 1920.[8] Terminating CSRS immediately would have been extremely disruptive of federal employees' retirement plans. On the other hand, requiring federal employees to contribute to both Social Security and CSRS would have made those employees the only persons in the country subject to a mandatory double deduction imposed under federal law. Thus, to treat incumbent federal employees as equally as possible with other wage earners, Congress

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[6] Respondents note (Br. in Opp. 22) that a very small minority of wage earners still remain outside the Social Security system. See generally 26 U.S.C. 3121(b) (1994 & Supp. III 1997) (setting forth various exceptions to coverage, including such persons as Bahamian temporary agricultural workers, student nurses, and teenagers delivering newspapers). That hardly establishes, however, that the imposition of Social Security taxes on judges' salaries is discriminatory. The taxes are surely generally applicable, even if they are not *universally* applicable—just as the income tax is not universally applicable, for not all persons have income.

[7] Respondents' discrimination argument does not apply to the Medicare hospital insurance tax, because all federal civilian employees were required to pay that tax after January 1, 1983. See Lynn Dec. ¶ 11, 94-5139 C.A. App. 109.

[8] See Act of May 22, 1920, ch. 195, 41 Stat. 614; 5 U.S.C. 719 (1925) (mandatory deduction from federal employees' salaries to finance retirement system).

allowed them to remain in CSRS.[9] Federal judges, however, were not subject to any similar mandatory civil-service retirement deduction, because judges are guaranteed a lifetime annuity, entirely at taxpayer expense, after retirement. See 28 U.S.C. 371 (1994 & Supp. III 1997). Congress therefore had no occasion to permit judges to "opt out" of Social Security.[10]

4. *Termination of Constitutional Violation.* Respondents argue (Br. in Opp. 24-28) that any Compensation Clause violation caused by the application of Social Security taxes to their salaries continues indefinitely and long after Congress raised their salaries (even net of taxes) above the level in effect before those taxes were first applied. Respondents maintain that, even after they received substantial raises in salary, they received less "compensation [than] they would have received but for the enactment of the challenged statutes" (*id.* at 28). Neither logic nor precedent supports that argument. Assume that in Year 1, judges are paid $150,000; in Year 2, Congress impermissibly reduces their stated salary to $140,000; and in Year 3, Congress

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[9] Federal employees as of December 31, 1983, were subsequently allowed to transfer from CSRS to a different retirement system that included coverage under Social Security, see Br. in Opp. 23, but because many had long contributed to CSRS and were familiar with that system, relatively few did so.

[10] Respondents also point out (Br. in Opp. 5-7) that, when Congress extended OASDI taxes to judicial salaries, it allowed a small number of high-level federal officials and employees to opt out of CSRS, thus (respondents contend) permitting those persons effectively to offset the incidence of the new OASDI taxes on their salaries. But as we explain in the text, if Congress had required federal employees to continue contributing to both CSRS and Social Security, they would have been subject to a double deduction. Moreover, Congress did not allow those high-level officials and employees to opt out of Social Security; it required them (like judges) to pay OASDI taxes, and made the second deduction to CSRS optional. Judges were not covered by CSRS, and so they had no cause to complain of double retirement deductions.

raises it to $160,000. Although the judges would be entitled to recover the $10,000 that they should have received in Year 2, one could hardly contend that in Year 3, Congress was constitutionally required to give the judges a salary of $170,000, merely because it raised their salary by $20,000 above the previous year's level.[11] Surely any Compensation Clause violation would have come to an end once Congress raised the salaries above the pre-diminution level, for after that point, the judges' salaries would no longer be "diminished" from what they were before the violation occurred.

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For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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[11] Moreover, contrary to respondents' suggestion (Br. in Opp. 25), it would scarcely matter *why* Congress would have granted judges such a salary increase. As a matter of pure arithmetic, there would no longer be any diminution once the judges' salaries were raised above the pre-diminution level.